

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )

Amendment of Part 90 of the Commission's )  
Rules to Facilitate Future Development of )  
SMR Systems in the 800 MHz Frequency Band )

PR Docket No. 93-144  
RM-8117, RM-8030  
RM-8029

and

DOCKET FILE COPY ORIGINAL

Implementation of Section 309(j) of the )  
Communications Act-Competitive Bidding )  
800 MHz SMR )

PP Docket No. 93-2

To: The Commission

**MOTION TO DEFER ACTION**

The following persons and entities ("Movants"), by and through counsel, hereby move the Commission to defer and delay any decision on the above captioned matter until such time as the United States Congress has been provided an opportunity to engage in hearings to determine whether the Commission's auction authority would be properly applied in the event that the proposals are adopted. Movants are:

**California**

Fresno Mobile Radio, Inc. of Fresno, California  
Madera Radio Dispatch, Inc. of Madera, California  
Applied Technology Group, Inc. of Bakersfield, California  
G & K Rentals of Bakersfield, California  
Alpha Radio Service of Bakersfield, California  
Cumulous Communications Corporation of Fresno, California  
Mobile Communications, Inc. of Merced, California  
L. Clarke Phillips of Chicago Park, California  
McGee Communications Electronics, Inc. of Stockton, California  
Ray's Radio, Inc. of Modesto, California  
Eden Communications, Inc. of Salinas, California  
X.W. Corporation d/b/a John Mitchell Company of Fullerton, California  
Mobile U.H.F., Inc. of Garden Grove, California

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A-1-A Security & Communications of Westminster, California  
Radiowave Communications, Inc. Of Long Beach, California  
Anderson Communications Corporation of Palm Desert, California  
Wise Electronics, Inc. of Brawley, California  
Communications Licensing Consultant of San Diego, California  
John Cook of Escondido, California  
Peak Relay of Valley Center, California  
Hi-Desert Communications of Hesperia, California

### **Washington State**

Radio Link Company of Seattle, Washington  
Columbia Communications, Inc. of Kennewick, Washington  
Spectrum Communications, Inc. of Moses Lake, Washington  
Americell Communications of Wilbur, Washington  
Whisler Communications of Olympia, Washington  
Spokane Paging & Telecommunications, Inc. of Spokane, Washington

### **Oregon**

Silke Communications, Inc. of Eugene, Oregon  
Starfone of Medford, Oregon

### **Arizona**

Pro Tec Mobile Communications, Inc. of Casa Grande, Arizona  
Gila Electronics of Yuma, Arizona  
Durham Communications, Inc. of Mesa, Arizona  
Joriga Electronics of Tempe, Arizona

### **Nevada**

Advanced Communications, Inc. of Sparks, Nevada  
Bill Ashby of Sparks, Nevada  
Cindy McGee of Reno, Nevada

### **Utah**

GSC Electric & Communications of Kearns, Utah

### **New Mexico**

Specialty Communications of Albuquerque, New Mexico

### **Colorado**

Omni Range Communications of Aurora, Colorado  
Bran-Dex Wireline Services, Inc. of Sterling, Colorado

### **South Dakota**

Communications Center, Inc. of Pierre, South Dakota  
Dakota Electronics of Aberdeen, South Dakota  
Vantek Communications of Sioux Falls, South Dakota

### **Nebraska**

Mobile Communications, Inc. of Omaha, Nebraska  
D & D Communications of Lincoln, Nebraska

### **Oklahoma**

Dave Fant Company d/b/a Oklahoma Radio Systems of Oklahoma City, Oklahoma  
Leon's Radio, Inc. of Oklahoma City, Oklahoma  
Total Com, Inc. of Enid, Oklahoma

### **Texas**

CommNet Communications Network, Inc. of Dallas, Texas  
Mobile Relays, Inc. of McAllen, Texas

### **Louisiana**

Communications Center, Inc. of Covington, Louisiana

### **Wisconsin**

Viking Communications, Inc. of Milwaukee, Wisconsin  
Communications Electronics of Fond du Lac, Wisconsin  
Air Communications of Central Wisconsin, Inc. of Wisconsin Rapids, Wisconsin  
JSM Systems, Inc. of Sheboygan Falls, Wisconsin  
4X Corporation of Appleton, Wisconsin  
Nielson Communications, Inc. of Green Bay, Wisconsin  
Camel Communications, Inc. of Cedarburg, Wisconsin  
Milwaukee Repeater Service, Inc. of West Allis, Wisconsin  
Concept—20 Communications, Inc. of Salem, Wisconsin  
Bandt Communications, Inc. of Janesville, Wisconsin

### **Illinois**

Supreme Radio Communications, Inc. of Peoria Heights, Illinois  
Craig Antenna Service of Pana, Illinois  
Stateline Communications, Inc. of Orangeville, Illinois

### **Michigan**

DeltaCom, Inc. of Detroit, Michigan  
Electronic Communications Company of Detroit, Michigan  
Midcom Service of Muskegon, Michigan  
General Communications Company of Grand Rapids, Michigan  
Johnson Repeater Company of Gaylord, Michigan  
Kay Communication of Saginaw, Michigan  
State Systems Radio, Inc. of Kalamazoo, Michigan  
Ernst Concrete & Supply Company of Warren, Michigan

### **Indiana**

Mobile Communications Corporation of South Bend, Indiana

### **Ohio**

Domer Communication, Inc. of North Canton, Ohio  
E.A. Henson of North Canton, Ohio  
Donald R. Nelsch d/b/a Donnel Communications of North Canton, Ohio  
Omnical of Columbus, Ohio

### **Kentucky**

C&C Communications of London, Kentucky

### **Tennessee**

Memphis 3rd Mobile Associates of Memphis, Tennessee  
Billy Rutledge of Bluff City, Tennessee

### **Pennsylvania**

Robert J. Fetterman d/b/a R.F. Communications of Catawissa, Pennsylvania  
Communicom of York, Pennsylvania  
Baycomm, Inc. of Paoli, Pennsylvania  
Centre Communications of Bellefonte, Pennsylvania

### **Delaware**

Baycomm, Inc. of Bear, Delaware  
American Industrial & Marine Electronics of Dover, Delaware

### **Maryland**

Charles C. Stull of Frederick, Maryland  
Ed Lachowicz of Lutherville, Maryland  
Frank Savarese of Lutherville, Maryland  
LP Communications of Lutherville, Maryland  
Commercial Electronics Services, Inc. of Waldorf, Maryland  
C & H Electronic Services, Inc. of Waldorf, Maryland  
Two-Way Radio, Inc. T/A TWR Communications of Cumberland, Maryland  
Action Radio of Wheaton, Maryland

### **Virginia**

Mid Atlantic Communications, Inc. of Fredricksburg, Virginia  
LandAir Communications & Electronics, Inc. of Virginia Beach, Virginia  
Business Autophones, Inc. of Roanoke, Virginia  
Valley Communications of Union Hall, Virginia  
Specialty Electronics Systems Company, Inc. of Lynchburg, Virginia  
Piedmont Electronics Company of Charlottesville, Virginia  
VA-KY Communications of Wise, Virginia  
LMR International, Inc. of McLean, Virginia  
Professional Communications of Blacksburg, Virginia  
Linden SMR Associates of Front Royal, Virginia  
Atlantic Communications, Inc. of Newport News, Virginia  
Valley Two Way, Inc. of Winchester, Virginia

### **North Carolina**

Professional Communications, Inc. of Fayetteville, North Carolina  
Golsboro Communications of Goldsboro, North Carolina

### **South Carolina**

CoastCom, Inc. of Garden City, South Carolina  
Riley's Communications, Inc. of Newberry, South Carolina

### **Georgia**

Donald Arsenault of Gainsville, Georgia

### **Florida**

Communications Service Center of Bradenton, Florida  
Lynn D. Clark of Venice, Florida

### **New York**

T & K Communications, Inc. of Owego, New York  
Genesee Business Radio Systems, Inc. of Rochester, New York  
Allstate Mobile Communications Corporation of Rochester, New York  
JPJ Electronic Communications, Inc. of Yorkville, New York  
Furman Communications, Inc. of Savannah, New York  
Bush Electronics, Inc. of Liverpool, New York  
Metro Electronics Service of Western New York, Inc. of Cheektowaga, New York  
Central Radio Communications Corporation of Deer Park, New York  
Cellular Design Corporation of Deer Park, New York  
Mobile Radio Network, Inc. of North Babylon, New York  
FM Communications of Tonowanda, New York

### **New Jersey**

Frequency Plus Corporation of East Brunswick, New Jersey  
Mobile Radio Dispatch Service, Inc. of East Brunswick, New Jersey  
Waxman Communications Corp. of Lindenwood, New Jersey

### **Connecticut**

Utility Communications, Inc. of Hamden, Connecticut

The 128 Movants represent companies and persons within 30 states, all of which have either previously included their objections to the Commission's intended adoption of its proposals within this proceeding, or hereby added their voice in objection to the Commission's intended actions. Movants represent a substantial portion of the SMR marketplace which would be adversely affected by the Commission's adoption of its proposals, as would the tens of thousands of subscribers, end users, and customers served by Movants.

### The Situation Demands Clarification

The Commission has proposed within this proceeding a novel use of its auction authority, which has never been tested before the courts or clarified by the U.S. Congress to the degree necessary to provide the Commission with sufficient assurances of its authority to adopt the proposals. Indeed, substantial doubt exists as to whether the Commission possesses sufficient authority from the U.S. Congress to adopt rules in accord with its proposals. That such doubt is real and not merely speculative is demonstrated by the correspondence received by the Commission from eleven members of the U.S. Congress who have clearly expressed that they do not hold that the Commission's adoption of its proposals would be within the auction authority articulated within Section 309 of the Communications Act of 1934 (as amended), see, Letter from U.S. Congressman Michael D. Crapo *et. al.* dated October 26, 1995.

Most of the Movants have earlier participated in this proceeding and have challenged the propriety of the intended adoption of the Commission's proposals and have included within that challenge an articulation of the problems which the Commission faces in justifying its authority in adoption, see, Further Comments filed by Fresno Mobile Radio, Inc. *et. al.*<sup>1</sup> Other opponents have also challenged the Commission's authority within this

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<sup>1</sup> Movants have also filed motions before the United States Department of Justice and the Federal Trade Commission, requesting their participation in this proceeding to determine whether adoption of the Commission's proposals would create an impermissible anticompetitive result in accord with the Communications Act, see, Motions filed by Fresno Mobile Radio, Inc. *et. al.* presented within this docket. Such motions were deemed appropriate in view of the Commission's oft stated reluctance to address issues arising under the antitrust statutes of the United States. Movants, therefore, respectfully suggest that the

proceeding. Accordingly, the issue of the Commission's authority is clearly a matter of record within this proceeding which begs an answer prior to any formal rule making decision. It is necessary and prudent that the Commission determine first, what it is empowered to do before it decides what to do. To ignore this core issue would be to suggest that the Commission is either unaware or unconcerned about the parameters of its auction authority and has chosen, instead, to move forward with capriciousness.

It is also clear by the Wireless Telecommunications Bureau's announcement on September 18, 1995 that this issue has not been fully addressed. Nowhere within that public meeting was there provided any justification of the Commission's actions which included any explanation of the Commission's interpretation of the relevant statutes that might provide such authority. It, therefore, falls upon the Commission to take such steps as are necessary to determine the parameters of its authority prior to exercising any presumed penumbra of its mandate from the U.S. Congress.

Certainly the Commission cannot believe that its authority is wholly unfettered and subject only to increasingly expansive interpretations. The plain language of the Communications Act belies such an opinion. Therefore, boundaries do exist and adoption of the proposals within this proceeding, at the least, encroach upon those boundaries and, more likely, exceed those boundaries, thereby creating a formula for failure following a court

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Commission would also benefit by these agencies' expert contributions and grant of the instant Motion would provide additional time to receive those agencies' comments which Movants deem to be invaluable to the Commission.



challenge of any adoption. Since there exists a substantial likelihood that adoption of the Commission's proposals would be reversed by the U.S. Court of Appeals, absent a clearer articulation of the Commission's auction authority by the U.S. Congress which included a mandate for the Commission to proceed toward adoption of its proposals, the Commission should avoid the adoption of rules which are likely to be later reversed and nullified.

### The Likelihood Of Hearings

Movants have had substantial contact with members of the U.S. Congress, including the members of the U.S. Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications which have stated an intention to hold hearings on this issue within the first two weeks of December 1995. Members of the association SMR WON have secured assurances that the hearings will take place in the near term.<sup>2</sup> *Telecommunications Reports* has stated in recent articles that the Senate aides serving the subcommittee have confirmed the intention to hold such hearings in the near term. Movants have been provided further assurances that the U.S. Congress intends to address directly the issue and provide necessary guidance to the Commission relevant to this proceeding and future proceedings. Accordingly, the instant request will not create any unnecessary burden on the Commission if granted. Instead, all parties will be provided with necessary clarity on this central question.

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<sup>2</sup> That such discussions have taken place and have resulted in the above described declarations may be confirmed by the staff members of United States Senator Larry Pressler's office who have provided such information to Movants.

The Commission's deferment would provide additional impetus for early scheduling of the hearings and would properly position the Commission as the servant of the U.S. Congress in meeting those mandates created by and through revisions in the Communications Act and the U.S. Congress' stated intentions in making such revisions, such as the adoption of the Commission's limited auction authority. Given the apparent need for such clarification felt within this proceeding, it has become incumbent on the Commission to defer this decision to the U.S. Congress to avoid inconsistent rulings from two bodies of government. To find a reason for grant of this Motion, one need only consider the legislative chaos which would ensue if the Commission adopts the proposals, then later Congressional hearings declare that such adoption is without Congressional authority.

Nor should the Commission subject the industry to this manner of legislative uncertainty. Such action would be without benefit to anyone and would chill the effectiveness of the Commission's action while interested persons were left to wait for the second answer from the U.S. Congress before acting. Further, the Commission should not place itself in a potentially vulnerable position, whereby the U.S. Congress might be forced to question and act to reverse the Commission's fresh decision. Such action by the U.S. Congress would undermine the credibility of the Commission in its making of future decisions, leaving open forever proceedings which would otherwise enjoy the benefit of closure which is administrative finality.

### Balancing of Interests

The injury and irreparable harm to Movants has been well articulated in this proceeding. There can be no doubt that adoption of the Commission's proposals will necessitate a substantial sacrifice by Movants. That such sacrifices would need to be made is undisputed by any of the Commission's proposals or any comments received within this proceeding, including those few comments supporting adoption. Accordingly, the issue of irreparable harm to Movants is well established within this docket and weighs in favor of grant of the instant Motion.

Conversely, no harm will result to any person as a result of grant of this Motion. First, the time period articulated by the U. S. Congress between this date and the date for hearings is intended to be brief. Therefore, the deferment requested will also be brief, simply allowing for such hearings to take place and the production of whatever means of communicating the U.S. Congress' position its members deem appropriate. Second, no commenting party has made a case that it will sustain injury arising out of delay, nor could any credible argument be made regarding a deferment period of only a month. In fact, no commenting party could make such a showing since no party would be positioned to state that it had reasonably relied on any scheduled action by the Commission.

As stated *supra*, the Commission would also be unharmed by its grant of the instant Motion and, in fact, would be benefitted by avoiding administrative waste, legislative

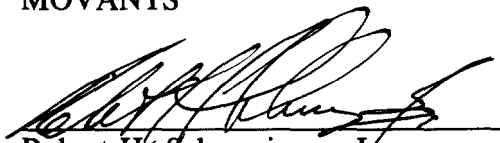
uncertainty, and likely challenges at the U.S. Court of Appeals. Therefore, it is in the Commission's interest to delay any decision within this proceeding.

Since there is no person which might be harmed by the Commission's grant of the instant Motion and since Movants would be substantially and irreparably harmed by the Commission's going forward following rejection of this Motion, any rational balancing of interests weighs heavily in favor of grant of this Motion.

#### Conclusion

For the above stated reasons, Movants request that the Commission defer any decision on the proposals presented within this proceeding until such time as the U.S. Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications has been provided an opportunity to hold hearings and decide with greater clarity whether adoption of the Commission's proposals would be an *ultra vires* act.

Respectfully submitted,  
MOVANTS



Robert H. Schwaninger, Jr.

Dated: 12/4/95

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this fourth day of December, 1995, I served a copy of the foregoing Motion to Defer Action on the following by placing a copy in the United States Mail, first class postage prepaid:

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